IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	I.D. 1607007843
FRANKLIN R. WRIGHT,	)	
	)	
Defendant.	)	

Date Decided: January 13, 2020

Upon Defendant Franklin R. Wright's Motion for Postconviction Relief
Denied.
Upon Rule 61 Counsel Jordan Law's Motion to Withdraw as Counsel
Granted.

ORDER

On July 11, 2016, Franklin R. Wright ("Defendant") was arrested by Newport Police Department. On August 15, 2016, Defendant was indicted on charges of Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited, Carrying a Concealed Deadly Weapon, Receiving a Stolen Firearm, Illegal Possession of Heroin in a Vehicle, Illegal Possession of Cocaine in a Vehicle, Illegal Possession of Amoxicillin in a Vehicle, Possession of Drug Paraphernalia, Illegal Possession of Marijuana in a Vehicle, and Failing to Signal. Defendant's trial occurred on July 12, 2017; a New Castle County Superior Court jury found Defendant guilty of Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited, Carrying a Concealed Deadly

Weapon, two counts of Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Failure to Signal. After granting the State's motion to declare Defendant a habitual offender under 11 *Del. C.* § 4214, the Court sentenced Defendant to 26 years of Level V incarceration suspended after 23 years for Level II probation.

After Defendant's appeal, the Delaware Supreme Court affirmed Defendant's conviction and sentence.[1] This *pro se* Motion for Postconviction Relief was filed on December 14, 2018. The Court appointed Rule 61 Counsel for Defendant on December 18, 2018. However, on July 12, 2019, Rule 61 Counsel filed a motion to withdraw as counsel stating that he could not ethically advocate Defendant's claims for postconviction relief. On August 16, 2019, Defendant filed a response to Rule 61 Counsel's motion to withdraw. On October 14, 2019, Defendant's Trial Counsel filed an affidavit. On October 31, 2019, the State filed its response.

Defendant's Assertions

Defendant raises two grounds for relief in his motion: 1) the State failed to charge him properly on the indictment under the standard set by the Delaware Supreme Court in *Williams v. State* and Trial Counsel was ineffective for failing to raise this argument at trial or on appeal; and 2) Trial Counsel did not provide Defendant with effective assistance of counsel.

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[1] *Wright v. State*, 2018 WL 6031433 (Del. Nov. 16, 2018).

Discussion

The Court must address potential procedural bars to relief under Rule 61(i) before assessing the merits of Defendant's motion.[2] The State has conceded, and the Court agrees, that Defendant's motion is not time barred or repetitive. Rule 61(i)(3) bars relief if the motion includes claims not asserted in the proceedings leading to the final judgment.[3] This bar is also not applicable because Defendant claims ineffective assistance of counsel, which could not have been raised in any direct appeal.[4] Finally, Rule 61(i)(4) bars relief if the motion is based on a formerly adjudicated ground.[5] This bar is also not applicable to Defendant's motion.

A. Defendant's Indictment

Defendant argues that the State failed to properly charge Defendant for Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited, and Carrying a Concealed Deadly Weapon because Defendant's indictment on these charges did not refer to Defendant's "vehicle." Defendant argues that the Delaware Supreme Court's holding in *Williams v. State* required the indictment to show that the vehicle was used "in the course of" or "in furtherance

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[2] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[3] Super. Ct. Crim. R. 61(i)(3).
[4] *See State v. Berry*, 2016 WL 5624893, at *4 (Del. Super. June 29, 2016) (finding Rule 61(i)(3) did not apply to the defendant's motion because ineffective assistance of counsel could not have been raised in any direct appeal).
[5] Super. Ct. Crim. R. 61(i)(4).

of" the firearms and ammunition charges. Defendant cites the Delaware Supreme Court's holding in *Williams*:

> We hold that where a burglary is alleged to be the felony on which the felony murder charge is predicated, the death that occurs must not only be "in the course of" the burglary but also must be "in furtherance of" the burglary. That is, the burglary must have an independent objective that the murder facilitates.[6]

The legal standard set by the Delaware Supreme Court in *Williams* does not apply to Defendant's case. In *Williams*, the Supreme Court faced the issue of whether an individual could be charged for both murder and felony murder when the sole objective of the felony was to commit murder.[7] At the time the Supreme Court decided *Williams*, Delaware's felony murder statute required that a murder be committed both "in the course of" and "in furtherance of" the commission of the felony.[8] Based on the plain language of the statute and the statute's use of "and" the Delaware Supreme Court held that the Delaware felony murder statute required the murder to 1) occur during the course of the felony and 2) facilitate the commission

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[6] *Williams v. State*, 818 A.2d 906, 908 (Del. 2002).

[7] *Id.* at 912 ("The question then remains whether the felony murder rule still includes a restriction that there be a causal connection between the felony and the murder in that the murder must be not only 'in the course of' but also 'in furtherance of' the felony.").

[8] *Id.* at 907, 912. Delaware's legislature has since removed the "in the course of" and "in furtherance of" requirements from the felony murder statute. 11 *Del. C.* § 636(a)(2) (West 2013). Delaware's legislature explicitly stated that its change to the statute was a response to and a disapproval of the *Williams* decision. *Comer v. State*, 977 A.2d 334, 340 (Del. 2009).

of the felony.[9] In the instant case, Defendant was not charged with murder or felony murder; accordingly, the *Williams* standard does not apply to Defendant's indictment.

Defendant was properly charged with Possession of a Firearm by a Person Prohibited ("PFBPP"). Under 11 *Del. C.* § 1448(a)(1), a person who has been convicted in Delaware of a felony or a crime of violence is prohibited from purchasing, owning, possessing, or controlling a deadly weapon within the state.[10] Defendant was previously convicted of Aggravated Menacing, which is classified as a violent felony.[11] Count I of Defendant's indictment—PFBPP—properly stated: 1) Defendant knowingly possessed a firearm on July 11, 2016; and 2) Defendant had previously been convicted of Aggravated Menacing. Therefore, Count I of Defendant's indictment contained all of the elements required for PFBPP.

Defendant was properly charged with Possession of Ammunition by a Person Prohibited ("PABPP"). Under 11 *Del. C.* § 1448(a)(1), a person who has been convicted in Delaware of a felony or a crime of violence is prohibited from purchasing, owning, possessing, or controlling ammunition for a firearm within the state.[12] Defendant was previously convicted of Aggravated Menacing, which is

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[9] *Williams*, 818 A.2d at 913.
[10] 11 *Del. C.* § 1448(a)(1).
[11] 11 *Del. C.* § 4201(c).
[12] 11 *Del. C.* § 1448(a)(1).

classified as a violent felony.[13] Count II of Defendant's indictment—PABPP—properly stated: 1) Defendant knowingly possessed ammunition on July 11, 2016; and 2) Defendant had previously been convicted of Aggravated Menacing. Therefore, Count II of Defendant's indictment contained all of the elements required for PABPP.

Defendant was properly charged with Carrying a Concealed Deadly Weapon ("CCDW"). Under 11 *Del. C.* § 1442, "a person is guilty of [CCDW] when that person carries a concealed deadly weapon upon or about the person without a license to do so."[14] Count III of Defendant's indictment—CCDW—properly stated that Defendant knowingly and unlawfully carried a concealed firearm, a deadly weapon, on July 11, 2016. Therefore, Count III of Defendant's indictment contained all of the elements required for CCDW.

Counts I, II, and III of Defendant's indictment did not reference Defendant's vehicle because Defendant's vehicle was not a required element of either PFBPP, PABPP, or CCDW. Defendant points out that his charges for possession of heroin, cocaine, amoxicillin, and marijuana specifically referred to Defendant's vehicle. This is true. However—unlike Counts I, II, and II—Defendant's vehicle was a required element of Defendant's controlled-substance charges; under the 2016

[13] 11 *Del. C.* § 4201(c).
[14] 11 *Del. C.* § 1442.

version of Delaware's criminal code, possessing a controlled substance *in a vehicle* was an aggravating factor that elevated the classification of the underlying offense.[15]

Defendant further argues that the alleged deficiency in his indictment resulted in a violation of Defendant's rights under the Fourteenth Amendment to the U.S. Constitution because Defendant was not given fair and adequate notice of the charges against him. In Delaware, an indictment puts an "accused on full notice of what he is called upon to defend."[16] The indictment satisfies that requirement if it contains a plain statement of the elements or essential facts of the crime.[17] Every count of Defendant's indictment contained a plain statement of the essential facts of the crime with which Defendant was charged; each count provided the date on which the crime allegedly occurred and described Defendant's conduct that alleged

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[15] Defendant was indicted in 2016 and thus, was indicted under the 2016 version of the Delaware Code. In 2016, if a person violated 16 *Del. C.* §§ 4761 (illegal possession of a non-controlled prescription drug), 4763 (illegal possession of a controlled substance), 4764 (possession of marijuana) and an aggravating factor was present, then the person was guilty of a specific class of misdemeanor offense. 16 *Del. C.* §§ 4761(b), 4763(c), 4764(a) (West 2016). Under the 2016 version of the Code, it was an "aggravating factor" if the "offense occurred in a vehicle." 16 *Del. C.* § 4751A(1)(c) (West 2016). In 2019, the Delaware legislature amended titles 11 and 16 of the Delaware Code relating to controlled substances and removed this aggravating factor.

[16] *Malloy v. State*, 462 A.2d 1088, 1093 (Del. 1983).

[17] *Id.*; *see also Wright v. State*, 2011 WL 51415, at *1 (Del. Jan. 6, 2011). Superior Court Criminal Rule 7(c) requires an indictment to be a "plain, concise and definite written statement of the essential facts constituting the offense charged." Super. Ct. Crim. R. 7(c).

constituted a violation of each offense. Therefore, Defendant was given fair and adequate notice of the charges against him.

B. Ineffective Assistance of Counsel

Delaware has adopted the two-prong test proffered in *Strickland v. Washington*[18] to evaluate ineffective assistance of counsel claims.[19] To succeed on an ineffective assistance of counsel claim, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."[20]

To avoid the "distorting effects of hindsight," counsel's actions are afforded a strong presumption of reasonableness.[21] The "benchmark for judging any claim of ineffectiveness [is to] be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[22] The Court's objective in evaluating counsel's conduct is to "reconstruct the circumstances of counsel's challenged conduct, and to *evaluate the conduct from counsel's perspective at the time.*"[23]

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[18] *Strickland v. Washington*, 466 U.S. 668 (1984).
[19] *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).
[20] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).
[21] *Neal v. State*, 80 A.3d 935, 942 (Del. 2013) (citing *Strickland*, 466 U.S. at 689).
[22] *State v. Wright*, 2015 WL 648818, at *3 (Del. Super. Feb. 12, 2015) (internal quotation marks omitted).
[23] *Neal*, 80 A.3d at 942 (citing *Strickland*, 466 U.S. at 689).

1. *Trial Counsel's alleged failure to raise the argument that the indictment was improper under* Williams v. State.

Trial Counsel provided effective assistance of counsel even though Trial Counsel did not challenge the indictment under the standard set by the Supreme Court in *Williams v. State*. The *Williams* case was about Delaware's felony murder statute. Defendant was not charged with murder or felony murder; the *Williams* holding does not apply to Defendant's case. Therefore, Trial Counsel had no legal basis to challenge the indictment for not complying with the *Williams* holding. Trial Counsel's representation of Defendant on this point was reasonable.

2. *Trial Counsel's alleged failure to call a defense DNA expert witness.*

Defendant alleges that his Sixth Amendment rights under the Confrontation Clause were violated because Trial Counsel failed to present a DNA expert witness to contradict the State's DNA expert witness. The Confrontation Clause of the Sixth Amendment protects Defendant's right "to be confronted with the witnesses against him."[24] The Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[25] Pursuant to the Confrontation Clause, witnesses against a defendant must testify under oath and be subject to cross-examination by the defense.[26] Here, the State's DNA expert witness testified under

[24] U.S. Const. amend VI.
[25] *Maryland v. Craig*, 497 U.S. 836, 844 (1990).
[26] *Id.* at 845–46.

oath at trial and was subject to cross-examination by Defendant's Trial Counsel. Defendant's rights under the Confrontation Clause were not violated.

Trial Counsel provided effective assistance of counsel even though Trial Counsel did not call a DNA expert witness. When the Court reviews a claim of ineffectiveness of counsel, there is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance; the burden is on the defendant to show the Court that the challenged conduct should not be considered "sound trial strategy."[27] To determine if Trial Counsel's conduct is reasonable, the Court will "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time."[28] The State's expert—Ms. Merkle—testified about the DNA evidence that was recovered from the firearm found in Defendant's vehicle. Much of this DNA evidence was inconclusive; Ms. Merkle testified that she could make no positive identifications for the DNA samples from the firearm's slide, magazine, and grip. However, Ms. Merkle was able to conclude from the DNA recovered from the firearm's trigger that the Defendant could be included as a potential DNA contributor to the mixed DNA profile pulled from the firearm's trigger. Faced with this limited DNA evidence linking Defendant to the firearm, Trial Counsel elected not to call a DNA expert witness on Defendant's

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[27] *Strickland*, 466 U.S. at 689.
[28] *Neal*, 80 A.3d at 942 (citing *Strickland*, 466 U.S. at 689).

behalf. Instead, Trial Counsel cross-examined Ms. Merkle about the sufficiency of the DNA profile. Trial Counsel focused on Ms. Merkle's conclusion that if the DNA was not from Defendant, then it was more likely that the DNA belonged to someone from the Caucasian or Hispanic population rather than someone who belonged to the African American population, like Defendant. Further, in Trial Counsel's closing argument, Trial Counsel highlighted the following facts for the jury: 1) the secret compartment was difficult for the officer to find at first; 2) the secret compartment was more accessible from the passenger side of the vehicle; and 3) if Defendant knew he had a secret compartment in his car, then he probably would have also hidden the controlled substances in that secret compartment. Trial Counsel's strategy was to show that Defendant did not know the firearm was in his vehicle. Based on the slight connection between the DNA evidence recovered from the firearm and the Defendant's DNA profile, the Court finds that Trial Counsel did not act unreasonably by highlighting the statistical inadequacies with the DNA evidence and by arguing that Defendant did not know of the secret compartment.

3. Trial Counsel's alleged failure to provide Defendant with a copy of the Rule 16 discovery.

Defendant cannot establish that Trial Counsel was ineffective under *Strickland*. Although Defendant states that Trial Counsel never provided Defendant with a copy of his Rule 16 discovery, Trial Counsel denies Defendant's assertion, states that Defendant received his Rule 16 discovery on May 12, 2017, and states

that they reviewed the State's evidence against Defendant with Defendant on multiple occasions in preparation for trial. Regardless of whether or not Defendant received his Rule 16 discovery, Defendant has failed to show how Trial Counsel's alleged failure to provide Defendant with his Rule 16 discovery affected the outcome of the trial.[29] Defendant has not shown the Court how the "result of the proceeding would have been different"[30] if Defendant had received his Rule 16 discovery. Therefore, Defendant has not shown prejudice from Trial Counsel's alleged action.

4. Trial Counsel's alleged failure to tell Defendant which attorney would represent him at trial.

Defendant cannot establish that Trial Counsel was ineffective under *Strickland*. Defendant argues that Trial Counsel never told Defendant which of them

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[29] According to the U.S. Supreme Court:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697.

[30] *Id.* at 694.

would represent Defendant at trial; Trial Counsel denies this allegation and states that Defendant knew which attorney would be representing him at trial and even expressly consented to that attorney representing him on the day of trial. Regardless of whether or not Defendant knew which attorney would represent him at trial, Defendant has not shown that the outcome of his trial would have been different had the other attorney handled the trial.[31] Therefore, Defendant has not shown that Trial Counsel's alleged failure prejudiced Defendant.

5. Trial Counsel's alleged failure to file a motion to suppress evidence.

Defendant cannot establish that Trial Counsel was ineffective under *Strickland*. Defendant argues that Trial Counsel denied Defendant's request to file a motion to suppress; Trial Counsel admits that it did not file a motion to suppress, but states that there were no valid, legal grounds for a motion to suppress. Trial Counsel's decision not to file a motion to suppress was reasonable. The police officer lawfully stopped Defendant's vehicle for failing to signal prior to changing lanes. Once the officer stopped Defendant's vehicle, the officer detected an odor of marijuana coming from Defendant's vehicle. After he exited the vehicle, the Defendant informed the officer that he had marijuana on his person. "So long as the police have probable cause to believe that an automobile is carrying contraband or

[31] *See id.* ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

evidence, they may lawfully search the vehicle without a warrant."[32] Because the officer had probable cause to search Defendant's vehicle, it was reasonable for Trial Counsel not to file a motion to suppress.

6. Trial Counsel's alleged failure to investigate Defendant's case.

Defendant cannot establish that Trial Counsel was ineffective under *Strickland*. Defendant argues that Trial Counsel failed to investigate his case in order to "raise every possible doubt" about the State's case. As Trial Counsel and the State explain, Trial Counsel could not investigate Defendant's case any more than they did because Defendant could not provide Trial Counsel with the name of the individual to whom Defendant had allegedly lent his car on July 11, 2019. Without knowing who else used Defendant's car that night, Trial Counsel could not find an alternative source for the firearm and ammunition that the police found in Defendant's vehicle. Trial Counsel investigated Defendant's case to the extent which they could and thus, acted reasonably under the circumstances.

7. Trial Counsel's alleged failure to prepare an adequate defense for Defendant.

Defendant cannot establish that Trial Counsel was ineffective under *Strickland*. Defendant argues that Trial Counsel failed to provide Defendant with adequate representation. Defendant's argument is a general assertion of inadequacy

[32] *Tatman v. State*, 494 A.2d 1249, 1251 (Del. 1985).

supported by no specific evidence of how Trial Counsel's representation was inadequate. There was a wealth of evidence against Defendant. Trial Counsel chose to attack the weakest piece of the evidence—the firearm—and tried to show the jury that there was reasonable doubt about whether or not Defendant knew the firearm was in his vehicle. Defendant has failed to show that Trial Counsel's actions were unreasonable.

Conclusion

First, Defendant's indictment did not need to comply with the *Williams* standard. Second, Defendant has failed to show that Trial Counsel's conduct constituted ineffective assistance of counsel under the two-prong *Strickland* standard. For the forgoing reasons, Defendant's Motion for Postconviction Relief is **DENIED** and Rule 61 Counsel's Motion to Withdraw is **GRANTED.**

IT IS SO ORDERED.

The Honorable Calvin L. Scott, Jr.